NO. 81-6156

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

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SUPREME COURT, U.S.

BILLY WAYNE WHITE,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. SHOULD THIS COURT CONSIDER A MATTER TO WHICH THE STATE APPELLATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to Petitioner's Writ of Certiorari files this its Brief in Opposition:

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, delivered September 23, 1981, White v. State, ____S.W.2d____ (Tex.Crim.App. 1981) is attached to the petition as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner basis his claims upon the Sixth, Eight and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On August 23, 1976, as Alge and Martha Spinks were closing their furniture store in Harris County for the evening, Petitioner entered the premises and asked to make purchases. Mrs. Spinks returned to the office area of the store to prepare a receipt for Petitioner's purchase, at which time Petitioner pulled out a gun and demanded money. Mr. Spinks gave Petitioner the receipts of the day, whereupon Petitioner shot Mrs. Spinks in the face and forced Mr. Spinks to lie on the floor. Mrs. Spinks died instantly as a result of the close-range gunshot wound to the face.

As Petitioner was attempting to remove jewelry from Mrs. Spinks' body, he dropped the gun and a struggle between Petitioner and Mr. Spinks ensued. Petitioner subsequently was apprehended fleeing from the furniture store.

On October 25, 1977, Petitioner was found guilty of the capital offense. On that same date, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, V.A.C.C.P. Accordingly, punishment was assessed at death.

SUMMARY OF THE ARGUMENT

This Court should refuse to consider a matter to which Petitioner made a procedural default under state law. At the time of Petitioner's trial, state procedural law required that a contemporaneous objection be made at trial to the alleged improper exclusion of a venireman. Since Petitioner failed to object as required by state law, the appellate court found that Petitioner had waived review of this claim. Because the state has a legitimate interest in the enforcement of its contemporaneous objection rule, this Court should refuse to consider the claim.

Even were review of this ground not precluded, Petitioner's contention that a venireman was excluded in violation of Witherspoon v. Illinois, is meritless. The record as a whole reflects that this venireman maintained that she could not vote for the imposition of the death penalty under any circumstances.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists.

II.

THIS COURT SHOULD REFUSE TO CONSIDER A MATTER TO WHICH THE STATE APPELLATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW.

Petitioner contends that venireman Barbara Jean Grace was excluded for cause in violation of the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968). When this contention was presented to the state appellate court, that court held that Petitioner had waived review of this ground, as he failed to make a contemporaneous objection on that ground at trial as was required by state procedural law in effect at the time of Petitioner's trial. See, Boulware v. State, 542 S.W.2d 677 (Tex.Crim.App. 1976) cert. denied, 430 U.S. 959 (1977).

This Court consistently has declined to review matters to which no proper objection was made at trial in compliance with state procedural requirements. The failure of a defendant to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court. Michigan v. Tyler, 436 U.S. 499 n.7 (1978). That the state has a legitimate

interest in requiring the parties to apprise the trial court of their grounds for complaint is well settled. See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973). The state's legitimate interest in this procedural rule is evident in the instant case where, if Petitioner believed that the doctrine of Witherspoon was violated, he should have apprised the trial court, giving that court an opportunity to remedy any defect before the completion of the entire voir dire and trial on the merits. Having failed to do so, review of this ground is precluded.

Nevertheless, even if review were not precluded, an examination of the entire record of this venireman's voir dire examination reveals that, after some equivocation, Grace unequivocally maintained that she could not vote for the imposition of the death penalty under any circumstances, and that, without regard to the evidence, she would answer the statutory special issues in such a way as to insure that the death penalty could not be imposed (SF 353-368). As such, her exclusion did not violate the doctrine of Witherspoon.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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